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STATE OF WASHINGTON

NO. 35383-1-II

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SUPREME COURT
OF THE STATE OF WASHINGTON

ABBEY ROAD GROUP, LLC, a Washington limited liability
company; Karl J. THUN and VIRGINIA S. THUN, husband and wife;
THOMAS PAVOLKA; VIRGINIA LESLIE REVOCABLE TRUST;
and WILLIAM AND LOUISE LESLIE FAMILY REVOCABLE
TRUST,
Petitioners,

v.

CITY OF BONNEY LAKE, a Washington municipal corporation,
Respondent.

ANSWER OF PETITIONERS' TO SUPPLEMENTAL BRIEF OF
AMICUS CURIAE BY WASHINGTON STATE ASSOCIATION OF
MUNICIPAL ATTORNEYS

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I. INTRODUCTION

Contrary to WSAMA's assertion, Abbey Road is not urging the Court to broadly expand the vested rights doctrine. The Court may limit its decision to the specific facts and permit of this case if it deems appropriate. However, as stated in Abbey Road's Supplemental Brief, the Court has before it the opportunity to clarify and harmonize the vested rights doctrine for all land use permit applications. If the Court decides to seize this opportunity, it should apply the doctrine to all land use permit applications.

II. ARGUMENT

A. *The Valley View and Erickson Cases*

The primary thrust of WSAMA's Supplemental Amicus Brief¹ is that Abbey Road's argument for vesting of all land use permit applications in general and Bonney Lake's Type 3 Site Development Permit application in particular, is at odds with the Supreme Court's decisions in *Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 733 P.2d 182 (1987), and *Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 684, 872 P.2d 1090 (1994). See Supplemental Amicus Brief at 4-12.

¹ WSAMA submitted a brief in response to Abbey Road's Petition for Review, with the same title as the brief it recently filed. To avoid confusion, Abbey Road will refer to the recently filed brief as "Supplemental Amicus Brief."

As explained in our previous briefing, a reading of the *Valley View* case reveals that the court's bare statement that "we reject any attempt to extend the vested rights doctrine to site plan review"² is dicta and is not a proper basis for denying vesting for Abbey Road's application. Court of Appeals Respondents' Brief at 24-25; Answer to Brief of Amicus Curiae at 3-4. Also, WSAMA's assertion that the land development process was just as complex at the time of *Valley View* is without merit. The site plan in *Valley View* was filed in 1978, prior to the adoption of the Growth Management Act. *Valley View*, 107 Wn.2d at 627. "Under the Act, most counties and municipalities must establish comprehensive development plans, identify natural resources and critical areas, as well as develop a variety of regulations consistent with the Act and the local development plans." *Erickson*, 123 Wn.2d at 876 (citing RCW 36.70A.060-.170). Even the *Erickson* court admitted that "Washington has undergone a sea change with respect to land use regulations," citing the GMA as an example. *Id.* at 875.

As explained in our previous briefing, the *Erickson* case is inapposite because *Erickson* did not address the issue of vesting of a master use permit application in the absence of a vesting ordinance, and nevertheless was wrongly decided because, among other things, its

² 107 Wn.2d at 639.

consideration of the relative cost of the application in its vested rights analysis was in error. *See* Court of Appeals Respondents' Brief at 10-23; Petition for Review at 4-14. Rather than restating the same arguments, Abbey Road refers the Court to its previous briefing.

B. Vested Rights Doctrine does not Contravene Police Power

WSAMA argues that the proposal advocated by Abbey Road could potentially undermine the ability of local governments to exercise police powers to protect public health, safety and the environment. Supplemental Amicus Brief at 8. WSAMA fails to recognize that the vested rights doctrine does not prevent local governments from regulating or extinguishing vested rights by exercising the police power "reasonably and in furtherance of a legitimate public goal." *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986). As the Supreme Court has stated, "there is no such thing as an inherent or vested right to imperil the health or impair the safety of the community." *Hass v. City of Kirkland*, 78 Wn.2d 929, 931, 481 P.2d 9 (1971). For example, the court in *West Main* noted, "under the State Environmental Policy Act of 1971 a municipality has the discretion to deny an application for a building permit because of adverse environmental impacts even if the application meets all other requirements and conditions of issuance. *West Main*, 106 Wn.2d at 53. Thus, WSAMA's concerns regarding contravention of local

government police power are unfounded.

C. Abbey Road's Proposal does not Promote Permit Speculation.

WSAMA argues that allowing vesting of site development permits would promote permit speculation. Supplemental Amicus Brief at 8-12. As stated in Abbey Road's Supplemental Brief,³ local governments can easily prevent permit speculation by placing reasonable time limits on permits. *Wolfe v. Bennett PS & E, Inc.*, 95 Wn. App. 71, 78 n.4, 974 P.2d 355 (1999) ("Time constraints ensure an applicant's good faith efforts in completing land use projects, thereby discouraging 'permit speculation'"). Reasonable time limits strike the appropriate balance between developer interest and public interest, by protecting developers who pursue their projects with reasonable diligence, while insuring that projects that are not pursued with diligence lose their vested status.

WSAMA also argues that such time limits do not provide a meaningful deterrent because they run from permit issuance rather than permit application. Supplemental Amicus Brief at 12. However, vesting is only triggered when a complete application is submitted. Once an application is complete, the timing for granting of the permit is in the hands of the local government, not the developer, and the Regulatory

³ Supplemental Brief at 6.

Reform Act already places time limits on permit issuance. *See* RCW 36.70B.080(1)(establishing 120 day time limit). Local governments can avoid any “application speculation”, if there is such a thing, simply by processing land use applications and making final decisions on them in a timely manner.

D. Vesting for Multiple Permits is Workable.

Contrary to WSAMA’s assertion in page 11 of its Supplemental Amicus Brief, Abbey Road’s proposal for vesting in multiple permit situations is not unworkable. Vesting of the right to develop should accrue only for permits that are intended to control the subsequent development of a property and provide the parameters for subsequent permits, such as site development permits and master use permits. This is the same approach already used for subdivisions and conditional use permits. *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 285, 943 P.2d 1378 (1997)(subdivisions); *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 894, 976 P.2d 1279 (1999)(conditional use permits). Like subdivisions and conditional use permits, if site development permit applications such as Abbey Road’s Type 3 site development permit are vested, but such vesting does not also extend to building permits and other subsequent permit applications necessary for development, vesting provides no protection, and is an “empty right.” If vesting in multiple

permit situations is workable for subdivisions and conditional use permits, it is also workable for site development permits and master use permits. Other permits, such as grading permits, which grant approval for only a narrow segment of a development, should not vest development rights for any subsequent permits.

III. CONCLUSION

For the reasons set forth herein, in Abbey Road's previous briefing, and in the Petition for Review, the Supreme Court should reverse the decision of the court of appeals, affirm the decision of the trial court and determine that Abbey Road's application and development are vested under the zoning and other land use control ordinances in effect at the time of submittal and not subject to City of Bonney Lake Ordinance No. 1160.

If the Supreme Court decides to issue a broad opinion on the vested rights doctrine, the doctrine should be applied to all land use permit applications, in order to clarify and harmonize the doctrine and reestablish fairness and certainty in the development process.

RESPECTFULLY SUBMITTED this 2nd day of February, 2009.

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